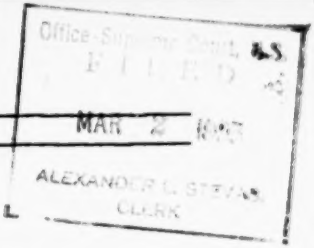
NO. 82-1481



In The

Supreme Court of the United States

October, 1983

Deborah Ann Astemborski
Petitioner

v.

Robert Susmarski

PETITION FOR WRIT OF CERTIORARI
FROM THE SUPREME COURT OF PENNSYLVANIA

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PETITION FOR A WRIT OF CERTIORARI
FROM THE SUPREME COURT OF PENNSYLVANIA

QUESTION PRESENTED FOR REVIEW

1. Is 42 Pa. C.S.A. §6704(e), specifying that actions for paternity must be brought within six years from the date of birth of a non-marital child, unconstitutional.

PARTIES

The caption of the case contains the names of all parties to the proceeding before the Supreme Court of the State of Pennsylvania.

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REPORTS

The opinions of the Pennsylvania Supreme Court is reported at 451 A.2d 1012.

JURISDICTION

The judgment of the Pennsylvania Supreme Court was dated November 4, 1982.

This is an Appeal from a final judgment of the State Court of last resort and jurisdiction is invoked under the provisions of 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

42 Pa. C.S.A. §6704(e):

> All actions to establish the paternity of a child born out of wedlock brought under this section must be commenced within six years of the birth of the child, except where the reputed father shall have voluntarily contributed to the support of the child or shall have acknowledged in writing his paternity,in which case an action maybe commenced at any time within two years of any such contribution or acknowledgement by the reputed father.

STATEMENT OF THE CASE

This suit in the name of Deborah Ann Astemborski was instituted on behalf of her child, Eric Ryan McKinley, who was born on January 13, 1975.

On September 2, 1980, Deborah Ann Astemborski assigned her rights concerning support for her child, Eric Ryan McKinley, to the Pennsylvania Department of Public Welfare. The assignment form was subsequently forwarded to the Support In-Take Office of Erie County Pennsylvania and was processed by the Domestic Relations Office of Erie County Pennsylvania in accordance with the established procedures. Thereafter, a complaint for support was entered on the Docket at the Erie County Prothonotary's Office on January 29, 1981, or six years and sixteen days after the birth of Eric Ryan McKinley.

Robert Susmarski, the alleged natural father of the child, Eric Ryan McKinley, thereafter filed a Motion to Dismiss the support complaint based upon the Statute of Limitations contained in 42 Pa. C.S.A. §6704(e), which provides that all actions for support involving non-marital children must be filed within six years from the birth of the child.

An Argument was held and Briefs were filed in the Erie County Court of Common Pleas, Sixth Judicial District for the State of Pennsylvania on Robert Susmarski's Motion to Dismiss the Complaint for Support.

The Court of Common Pleas filed an Opinion and entered an Order dated April 12, 1982 holding that the provisions of 42 Pa. C.S.A. §6704(e) were unconstitutional as being violative of the equal protection and due process provisions of the United States and Pennsylvania Constitutions. Therefore the Court denied the Motion to Dismiss the support complaint filed by Robert Susmarski.

A direct appeal to the Pennsylvania Supreme Court was taken on May 12, 1982 and subsequently argued on September 23, 1982. In an Opinion and Order filed November 4, 1982, the Pennsylvania Supreme Court overturned the Court of Common Pleas of the Six Judicial District of Pennsylvania and upheld the provisions of 42 Pa. C.S.A. §6704(e) as being constitutional.

This Petition for Writ of Certiorari is from the Order of the Pennsylvania Supreme Court dated November 4, 1982.

REASONS FOR GRANTING THE WRIT

1. Conflict with Other Decisions

While the issue before the Court is extremely brief and narrowly drawn, it is none the less important and ripe for decision. The issue for

decision is whether 42 Pa. C.S.A. §6704(e) of the Judicial Code, relating to the six year Statute of Limitations of paternity cases, violates the equal protection clause of the Fourteenth Amendment of the United States Constitution and Article One Section 26 of the Pennsylvania Constitution, by requiring that all actions to establish paternity of a child born out of wedlock must be commenced within six years of the birth of the child in order to sue for support, and by not imposing such a restriction upon a child born in wedlock.

In Gomez v. Perez 409 U.S. 535, 93 S. Ct. 872, 35 L.Ed. 2d 56(1973), the Supreme Court held that a Texas law granting two legitimate children the right to recovery rights in Workman's Compensation claims, but denying that right to illegitimate children, was unconstitutional as violative of the Equal Protection Clause and constitute invidious discrimination without justification. The Court discussed the problems in proving paternity but stated:

> "we recognize the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that

works to shield otherwise invidious discrimination." (At p.538).

Applying these standards established by the United States Supreme Court, several states have found limitations of actions in paternity actions to be unconstitutional.

The Florida Supreme Court in Gillespie v. West 378 S. 2d 1220 (1980) held the Florida four year Statute of Limitations to be unconstitutional. The Court found that the interest of the State to discourage stall claims was irrelevant due to the recurring and continuing nature of child support. It further discounted that proof of paternity becomes more difficult with the passage of time. The Court stated:

> "Furthermore, this Statute bears at best a tenuous relationship to the interest it seeks to advance of ensuring the availability of adequate proof of paternity. The arbitrary determination that paternity can only be proved in four years creates an inpenetrable barrier to an illegitimate child's right to seek support without considering alternatives which deal directly with the problem of proof. Although proof of paternity may become more difficult with the passage of time, this mere possibility cannot be allowed to work an unconstitutional discrimination against illegitimate children."

The Court also held that the only proper application of any Statute of Limitations is to barr claims after they had accrued and had not been adjudicated within the time limit. The duty of support is an on-going one throughout minority, and new causes of action accrue each day the father does not provide support. "This duty cannot be barred for illegitimates if it is allowed for legitimate children."

The North Carolina Court of Appeals found the state's three years Statute of Limitations for paternity actions unconstitutional in County of Lenoir Ex. rel. Cogdell v. Johnson, 264 S.E. 2d 816 (1980). The Court dismissed the defendant's argument of a substantial state interest in preventing stale or fraudulent claims by stating that child support is ongoing and therefore can never be stale. It also noted that the mere passage of time does not bear a direct relation to the truth of the claim. Lastly, the Court stated that a child's need for support far out weighs the state's interest in preventing stale claims.

In Re: Interest of Miller, 605 S.W. 2d 332, (1980) the Texas Court of Civil Appeals held the one year Statute of Limitations unconstitutional as a denial of

equal protection pursuant to Gomez v. Perez, Supra, thereby reversing an existing Texas case law. In so doing, the Court followed the same logic as applied by Florida in Gillespie v. West, Supra, and North Carolina in Lenoir v. Johnson, Supra, the Court in Miller held:

> "....We find the Statute unconstitutional in that it creates two classes, legitimates and illegitimates, invidiously discriminating against the latter class. To hold otherwise would allow the illegitimates rights to support be waived by the mother. Not only owuld this result in unequal protection under the law, as legitimates are not subject to the same ultimate waiver and foreclosure of their rights to support by third persons, but such denial would violate the illegitimate's constitutional rights to due process. Nullus Jus alienum foris facere potest. The law does not permit one to forfeit another's right. The right of an illegitimate child to assert a claim for parental support is too fundamental to permit it forfeiture by the mother's failure to timely institute a filiation proceeding."

The Court concluded by noting the stale or fraudulent claims argument and dismissing the same as against the State's public policy that parents are obligated to support their children regardless of marital status at birth.

A few jurisdictions have held Statute of Limitations constitutional. These include Maryland in Thompson v.

Thompson, 404 A.2d 269 (1979) and Iowa Ex. rel Krupkie v. Witkowski, 256 N.W. 2d 216 (1977). These cases hold that the Statute of Limitations is a reasonable limitation upon the ability of a child to establish paternity. They have found that the State's interest in avoiding stale claims is more important than that of a child receiving support.

In additon to the foregoing reasons regarding the propriety of granting Certiorari, this Court, as recently as April, 1982, has considered this matter involving a Texas oneyear Statute of Limitations and four separate concurring opinions were submitted by the Court. In Mills v. Habluetzel _____U.S._____102 S. Ct. 1549 (1982), this Court overturned a Texas one year Statute of Limitation and the concurring Opinions left ajar consideration by the Court of longer periods of limitations.

In Mills, Justice O'Connor, with the Chief Justice Justice Brennan and Justice Blackmun joining stated:

> "Today this Court holds that a Texas Statute proscribing a one year statute of limitations for paternity suits violates the Equal Protection Clause of the Fourteenth Amendment. Although I agree with the Court's analysis and results, I write separately because I fear that the Opinion

may be misinterpreting as approving the four year Statute of Limitations now used in Texas." (At p. 1556)

The Court went on to say:

"Finally, the practical obstacles to filing suit within one year of birth could as easily as several years after the birth of the illegitimate child....the risk that the child will find himself without financial support from his natural father seems as likely throughout his minority as during the first year of his life." (At p. 1557-1558)

Petitioner submits because this issue is of timely concern to both the citizens of the Commonwealth of Pennsylvania and obviously by virtue of the concurring opinion in the Mills decision that Certiorari should be granted to hear this case.

2. Impact to the States

This Court has long recognized the valid interest of a state to secure support for the child born out of wedlock and to prevent it from becoming a public charge.

When considered in the light of an equal protection due process analysis, there is no apparent reason for treating a marital child differently from the non-marital child.

Obviously, if non-marital children or, when their rights are properly assigned, public agencies, are able

to secure support from the responsible party throughout the period of minority, the burden on tax payers would be substantially lessened. The state's interest in attempting to hold responsible those individuals with primary responsible for support should be of paramount consideration.

CONCLUSION

Because of this Court's obvious interest, as demonstrated in the Mills decision and the conflict among various state decisions concerning Statutes of Limitations in paternity actions, as well as, the State's vital interest financially, this Court should grant Certiorari.

Respectfully submitted,

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82-1481

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CLERK

NO.

In The

Supreme Court of the United States

October, 1983

DEBORAH ANN ASTEMBROSKI
Petitioner

v.

ROBERT SUSMARSKI

PETITION FOR WRIT OF CERTIORARI
FROM THE SUPREME COURT OF PENNSYLVANIA

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APPENDIX A

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 22W.D. Appeal Dkt. 1982

DEBORAH ANN ASTEMBORSKI
Appellee

v.

ROBERT SUSMARSKI
Appellant

ON APPEAL FROM THE COURT OF COMMON PLEAS
SIXTH JUDICIAL DISTRICT ERIE COUNTY PENNSYLVANIA

Argued September 23, 1982
Before: The Pennsylvania Supreme Court en banc
(Opinion Filed November 4, 1982)

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(J-227-82)

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

DEBORAH ANN ASTEMBORSKI, Appellee	:	NO. 22W.D. Appeal Dkt. 1982
	:	Appeal from the revised Order of April 12, 1982 of the Court of Common Pleas of the Sixth
vs	:	Judicial District at NO. 87-NS-1981, as further amended by Order of May 13, 1982.
ROBERT SUSMARSKI, Appellant	:	ARGUED: September 23, 1982

OPINION OF THE COURT

MR. JUSTICE FLAHERTY Filed: November 4, 1982

This is an appeal from a decision of the Court of Common Pleas of the Sixth Judicial District which held unconstitutional a statute of limitations requiring that actions to establish the paternity of a child born out of wedlock be commenced within six years of the birth of the child.[1]

---

[1]The applicable statute of limitations, 42 Pa. C.S.A. §6704(e), provides:

(Footnote 1 continued:)

> (e) LIMITATION OF ACTIONS.-- All actions to establish the paternity of a child born out of wedlock brought under this section must be commenced within six years of the birth of the child, except where the reputed father shall have voluntarily contributed to the support of the child or shall have acknowledged in writing his paternity, in which case an action may be commenced at any time within two years of any such contribution or acknowledgement by the reputed father.

In the instant case, it is undisputed that the alleged father has not acknowledged paternity and has not contributed to support of the child; hence, the six year period of limitation applies.

On September 9, 1980, Deborah Ann Astemborski, appellee, filed an application for support with the Commonwealth's Department of Public Welfare and, in so doing, assigned to the Commonwealth all rights concerning support of her child. Accordingly, on December 30, 1980, she appeared at the intake office of the Erie County Domestic Relations Department and filled out a Complaint for Support which was dated and marked filed December 30, 1980. This complaint was taken to the Prothonotary in order to receive a civil number on January 29, 1981, fifteen days after the applicable six year statute of limitations had expired. The trial court held that the governing rule at the time required the complaint to be filed with the Prothonotary, not with the Domestic Relations Department. For this reason, the trial court concluded that the complaint was not timely filed, and the alleged father of appellee's child, appellant Robert Susmarski, moved for dismissal of the complaint. Dismissal was denied, however, as the court declared the statute of limitations

invalid.

The primary issue[2] in the instant appeal is whether the six year statute of limitations violates equal protection guarantees of the Fourteenth Amendment to the United States Constitution and of Article I, §26 of the Pennsylvania Constitution. Since support of a child born in wedlock may be sought at any time during its minority, while support for a child born out of wedlock may, due to the statute of limitations on establishment of paternity, be sought during only the first six years of a child's life, a disparity of treatment is alleged to exist in violation of equal protection guarantees. Specifically, appellee contends that the statute imposes a burden with respect to illegitimate children

---

[2]Two other issues raised in the case are that the County of Erie is not a real party in interest and is without standing to prosecute the case, and that the lower court erred in permitting the intervention of Erie County as a party without the filing of appropriate pleadings. Because of our disposition of this case on the equal protection issue, we do not address the other issues raised by appellant.

that is not shared by legitimate children, and that this burden is not justified by the Commonwealth's interest in preventing the assertion of stale or fraudulent claims.

The issue raised by the instant case parallels that recently decided by the Supreme Court of the United States in Mills v. Habluetzel, ____U.S.____, 102 S. Ct. 1549, 71 L.Ed. 2d. 770 (1982). In Mills, a Texas statute barring paternity suits brought on behalf of illegitimate children more than one year after their birth was held violative of equal protection. Justice Rehnquist, writing for the Court, thoroughly analyzed the considerations governing scrutiny, on equal protection grounds, of such statutes of limitation:

> Our decision in Gomez (v. Perez, 409 U.S. 535, 35 L.Ed.2d. 56, 93 S.Ct. (1973)) held that "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." 409 U.S. at 538, 35 L.Ed. 2d 56, 93 S.Ct. 872. Specifically, we

held that a State which grants an opportunity for legitimate children to obtain paternal support must also grant that opportunity to illegitimate children. If Gomez and the equal protection principles which underlie it are to have any meaning, it is clear that the support opportunity provided by the State to illegitimate children must be more than illusory. The period for asserting the right to support must be sufficiently long to permit those who normally have an interest in such children to bring an action on their behalf despite the difficult personal, family, and financial circumstances that often surround the birth of a child outside of wedlock. It would hardly satisfy the demands of equal protection and the holding of Gomez to remove an "impenetrable barrier" to support, only to replace it with an opportunity so truncated that few could utilize it effectively.

The fact that (the State) must provide illegitimate children with a bona fide opportunity to obtain paternal support does not mean, however, that it must adopt procedures for illegitimate children that are coterminous with those accorded legitimate children. Paternal support suits on behalf of illegitimate children contain an element that such suits for legitimate children do not contain: proof of paternity. Such proof is often sketchy and strongly contested, frequently turning upon conflicting testimony from only two witnesses. Indeed, the problems of proving paternity have been recognized repeatedly by

this Court...[3]

> Therefore, in support suits by illegitimate children more than in support suits by legitimate children, the State has an interest in preventing the prosecution of stale or fraudulent claims, and may impose greater restrictions on the former than it imposes on the latter. Such restrictions will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest...The State's interest in avoiding the litigation of stale or fraudulent claims will justify those periods of limitation that are sufficiently long to present a real threat of loss or diminution of evidence, or an increased vulnerability to fraudulent claims.

___U.S. at_____, 102 S.Ct. at___, 71 L.Ed. 2d at 776-777. (Emphasis added; footnote omitted, citations omitted).

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[3]In Mills, ____U.S. at ____, 102 S.Ct. at _____, 71 L.Ed. 2d at 777, n.4, the Court rejected an argument in the instant case, that recent advances in blood and genetic testing have proved scientific means so highly probative in determining paternity that their existence negates the state interest in avoiding litigation of stale or fraudulent claims. While these tests may, to a high degree of probability, be predictors of paternity or of non-paternity, if test results do not exclude a certain male from the class of possible fathers, that male must rely on conventional

(Footnote 3 con't.)

forms of evidence as proof of non-paternity viz. evidence of lack of access to the mother, as well as his own testimony and the testimony of others. With regard to these conventional forms of proof, the state has a clear interest in having claims litigated while evidence remains available and fresh.

Thus, to be sustained on equal protection grounds, a statute of limitations governing assertion of paternity claims must satisfy two related requirements. First, the period during which claims may be asserted "must be sufficiently long in duration to present a reasonable opportunity for those with an interest in such children to assert claims on their behalf." Id. at_____, 102 S. Ct. at_____ 71 L.Ed.2d at 778. Second, the time limitation imposed "must be substantially related to the State's interest in avoiding the litigation of stale or fraudulent claims." Id. Examining this Commonwealth's six year statute of limitations in light of these requirements, we find no denial of equal protection.

Although the statute of limitations in question, as applied, results in there being greater impediments to the obtainment of support for an illegitimate child than for one born in wedlock, the support opportunity still accorded the former is not so truncated

as to be, as termed by the Court in Mills, merely "illusory." Allowance of a six year period in which to institute a paternity claim does not so restrict support rights as to effectively extinguish them. Unlike Mills, wherein certain birth related financial and emotional factors were cited as encumbering a mother's filing of a paternity suit within twelve months of her child's birth, the present case involves a period of limitation of such greater duration as to negate birth-realted encumbrances. Furthermore, as pointed out by Justice Rehnquist in Mills, the existence of greater impediments to recovery of support for an illegitimate child than for a legitimate one is justified by the fact that the cases differ in one crucial respect: a suit on behalf of an illegitimate child contains the element of proof of paternity, while a suit on behalf of a legitimate child does not. While the passage of twelve months could not be regarded as appreciably increasing the likelihood of fraudulent claims, a lapse of more than six years

may reasonably be expected to coincide with prejudice to the defense through loss of evidence, the death or disappearance of witnesses, and the fading of memories. Hence, the Commonwealth's interest in elimination of stale or fraudulent claims is substantially served by the limitation imposed.[4]

It is true that the legislative scheme of this statute will preclude certain claims from being successfully asserted. In the case at bar, the mother, representing her child, could have initiated a support action at any time prior to December 30, 1980, when she assigned her support rights to the Commonwealth.

---

[4]Justice O'Connor, concurring in Mills, and joined by three of her colleagues and specially joined by Justice Powell, specified that by invalidating the one-year statute the Court did not intend to prejudge the constitutionality of longer periods of limitation. We regard this as meaning simply that the Court would consider each such statute on its merits in light of the standards of evaluation set forth in Mills. Accord Pickett v. Brown,

(Footnote 4 con't.)

_____S.W._____(tenn. Sup. Ct. filed 8-30-82) (upholding two year statute of limitations upon actions to establish paternity citing Mills).

The concurring opinion found it significant that a paternity suit was "one of the few Texas causes of action not tolled during the minority of the plaintiff," and that, therefore, it was "fair to question whether the burden placed on illegitimates (was) designed to advance permissible state interests." _____U.S.____. 102 S.Ct. at 1556, 71 L.Ed.2d at 781. The concurring opinion also found it significant that the one-year period of limitation was not sufficiently long to permit either the child or the mother to assert a claim for child support where there had been a continuing relationship between the natural father and mother or child for an extended period beyond the child's birth. Id at 1556-57, 71L.Ed. 2d at 782.

Except in certain limited circumstances Pennsylvania, unlike Texas, does not provide for the tolling of statutes of limitations during minority. See 42 Pa.C.D. Sec. 5533. Thus, in Pennsylvania, paternity actions are treated no differently from the vast majority of actions brought on behalf of a child.

Moreover, the statute at issue sets forth exceptions to the six year period of limitation which are designed to deal with the situation where a child born out of wedlock has had a continuing relationship with the natural father during the first six years of the child's life but the father has abandoned the child at a later point in the child's minority. Under Section 6704(e), supra note 1

(Footnote 4 con't.)

where the natural father has either voluntarily contributed to the support of the child or acknowledged in writing his paternity, "an action may be commenced at any time within two years of any such contribution or acknowledgement by the reputed father." Whereas the Texas one year statute of limitations unreasonably hindered the opportunity to prove paternity and thus obtain child support, the Pennsylvania statute adequately affords a fair opportunity to do so.

Because she neglected to do this, for whatever reason, her child is now prevented forever from asserting a successful claim for support against the alleged father, at least in the absence of any estoppel or statutory exceptions. We do not address the wisdom of the legislative scheme, but only its constitutionality. Since the statute is substantially related to a legitimate state interest, viz., the prevention of stale or fraudulent paternity claims, it is not constitutionally infirm under a Fourteenth Amendment challenge even though the statute may operate, as it has in this case, to deprive an illegitimate child of its right to make a claim for support beyond the six year limit.

Having determined that the court below erroneously held the statute of limitations barring appellee's claim for support to be unconstitutional, we reverse.

Order reversed.

APPENDIX B

DEBORAH ANN ASTEMBORSKI	:	IN THE COURT OF COMMON
	:	PLEAS OF ERIE COUNTY,
vs	:	PENNSYLVANIA
	:	
	:	CIVIL DIVISION
ROBERT SUSMARSKI	:	NO. 87-NS-1981

REVISED ORDER AND OPINION
DATED APRIL 12, 1982

DEBORAH ANN ASTEMBORSKI	:	IN THE COURT OF COMMON
	:	PLEAS OF ERIE COUNTY,
V.	:	PENNSYLVANIA
	:	
	:	CIVIL DIVISION
ROBERT SUSMARSKI	:	NO. 87-NS-1981

Thomas S. Kubinski, Esquire, for County of Erie
Ronald J. Susmarski, Esquire, for defendant

REVISED OPINION AND ORDER

Richard L. Nygaard, Judge -- April 12, 1982

On September 9, 1980 Plaintiff Deborah Ann Astemborski filled out an application for support at the Commonwealth of Pennsylvania Department of Public Welfare. At that time she assigned her support rights to the Commonwealth of Pennsylvania. The plaintiff was required by the Commonwealth to apply for child support at the Erie County Domestic Relations Office. The plaintiff appeared at the Intake Office of the Erie County Domestic Relations Department on December 30, 1980. On January 13, 1981, the six-year Statute of Limitations for child support ran out. On January 29, 1981, the Domestic Relations Department took the Complaint for Support to the Prothonotary to receive a civil support number and time stamped the

Complaint at that time. On or about November 3, 1981, the defendant filed a Motion to Dismiss the Complaint because the Statute of Limitations had expired before commencement of the action.

The first issue for consideration by the Court is whether or not the plaintiff tolled the Statute of Limitations by filing her complaint in the Domestic Relations Section of the Erie County Court of Common Pleas on December 30, 1980.

The applicable Statute of Limitations is found in 42 Pa. C.S.A. 6704(e) which provides the following:

> All actions to establish the paternity of a child born out of wedlock brought under this section must be commenced within six years of the birth of the child, except where the reputed father shall have voluntarily contributed to the support of the child or shall have acknowledged in writing his paternity, in which case an action may be commenced at any time within two years of any such contribution or acknowledgment by the reputed father.

There is no question in the instant case that the father has not acknowledged paternity nor has he made any contributions of support

to the child. Therefore, the Statute of Limitations which would be applicable in this case is six years. According to the Judicial Code, 42 Pa. C.S.A. S5503, matters are commenced for purposes of the Statute of Limitations when "a document embodying the matter is filed at an office authorized by S5103 . . . or by any other provision of law to receive such document."

In 1978, by Rule 509, this Court established a procedure for filing non-support actions, requiring that non-support actions

> "be commenced through an interview and preparation of the non-support petition in the office of . . . Non-Support Local Intake Officer, who shall then file the petition with the Prothonotary of this Court."

This Rule does not positively determine whether or not the statute is tolled by the "interview and preparation of the non-support petition," or filing the petition "with the prothonotary of this Court." However, inasmuch as the plaintiff has at that point complied with the rules of both the State and the local courts,

it is the opinion of this Court that she should have some degree of confidence that the action has been commenced.

However, this issue becomes further complicated when on July 1, 1979, the local rules were amended to include the following in part:

> "All support action shall be commenced by the filing of a verified complaint with the Prothonotary . ." (Rule 603(a)).

Further, on April 23, 1981, the Supreme Court of Pennsylvania promulgated amended Rules of Civil Procedure governing actions for support as follows:

> "An action shall be commenced by filing a complaint with the Domestic Relations Section of the Court of Common Pleas." (Rule 1910.4)

This Court is of the opinion that were Rule 1910.4 in effect at the time of the filing of this complaint, it would be a plain statement of the correct law and would control the manner of and the location of which actions must be commenced for purposes of 42 Pa. C.S.A. 5503; S961; and, would toll the statute of limitations found in S6704(e).

However, inasmuch as this action was filed at the intake office on December 30, 1980 and not filed with the prothonotary until January 13, 1981, this rule would not control. At the time of the filing, the only proper place to file was in the office of the Prothonotary, Rule 603(a). This was not done.

The final issue before this Court is whether 42 Pa. C.S.A. S6704(e), of the Judicial Code violates the equal protection clause of the Fourteenth Amendment of the United States Constitution and Article 1, S26 of the Pennsylvania Constitution, by requiring that all actions to establish paternity of a child born out of wedlock must be commenced within six years of the birth of the child in order to sue for support, and by not imposing such a restriction upon a child born in wedlock.

The Solicitor for the County of Erie, on behalf of the plaintiff herein, contends that the time limitations contained in S6704(e), unconstitutionally treat non-marital children differently than marital children. Plaintiff

further contends that all children have an equal right to seek support from their natural fathers.

First of all, in accordance with the principles enunciated in Parker v. Children's Hospital Philadelphia, 483 Pa. 106 (1978) at 116, the Pennsylvania Supreme Court notes that:

> "a legislative enactment enjoys a presumption in favor of its constitutionality and will not be declared unconstitutional unless it clearly, palpably, and plainly violates the Constitution. All doubts are to be resolved in favor of a finding of constitutionality.
>
> Further, the United States Supreme Court has stated that "state laws are generally entitled to a presumption of validity against attack under the equal protection clause."

Parham v. Hughes, 441 U.S. 347, 351, 60 L.Ed.2 269 (1979).

While the Court keeps this presumption in mind, upon a review of the most recent United States Supreme Court cases dealing with the scope of Judicial Review concerning rights of non-marital children, and, an examination of various State Court cases (Texas, Kansas, New Mexico, North Carolina, Florida and

Montana) we find that the cases holding the statute of limitations invalid as violative of the Equal Protection clause, most persuasive. Specifically, we are most persuaded with Appeals in County of Lenoir Cogdell v. Johnson 264 S.E. 2 816 (N.C.App. 1980) which states as follows:

> "we have no reason to believe that the mere passage of time bears a direct relationship to the truth of the claim asserted. Moreover, the need of the child to receive adequate support manifestly outweighs the relation the statute of limitations may have to the prevention of fraudulent claims. An especially troublesome aspect of the application of the statute here is that the child is wholly reliant on his mother or the State to bring a claim in its behalf before the statute runs. In further support of our position, it is clear that the limitation stated in (here quoted the North Carolina State Law) is inconsistent with the State's interest in preventing, whenever possible, illegitimate children from becoming public charges."

The Court further notes that the Courts of Pennsylvania have long recognized the fact that no agreement reached between a mother and a putative father can in any way prejudice

the rights of the child. To permit a statute as this to stand, would permit a mother to frustrate that intention and either negligently or purposely allow the statute to run, to the jeopardy of the child.

Further, the Pennsylvania Statute of Limitations, does not achieve the State's objective of avoiding stale claims. An arbitrary period of time will not and cannot insure the availability of proof of paternity within the child's first six years of life. The "Uniform Act on Blood Tests to Determine Paternity," enacted by this State on July 9, 1976, P.L. 586, effective June 27, 1978, recognizes the value of so called "HLA" tests of the child and father. The factors which determine paternity in the tests used by the Commonwealth, do not diminish or change with the passage of time.

Furthermore, the Statute of Limitations contained in S6704(e) if permitted to stand, would essentially terminate the rights of a

child born out of wedlock to support permanently, unless the reputed father decided to support the child and invoke the two year Statute of Limitations. This Court finds that Statute repugnant to the rights of the non-marital child and in contravention of its constitutional rights. The Statute stands as an impenetrable barrier to a non-marital child's right to support after six years of inaction by one who in law does not have a right to jeopardize the child's rights.

This Statute must be invalidated by virtue of the clear language of the United States Supreme Court in the case of Gomez v. Perez 409 U.S. 535 (1973), which states:

> "we recognize the lurking problems with respect to proof of paternity. Those problems are not be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination."

The Pennsylvania Supreme Court in Commonweatlh vs. Staub, 461 Pa. 486 (1975), at 491 states that:

> "it is clear that the primary interest of the status to secure

> support for the child born out of wedlock and to prevent it from becoming a public charge."

Most recently, the U.S. Supreme Court in Mills v. Habluetzel 50 L.W. 4372 (April 5, 1982) declared a one year statute in Texas unconstitutional. Five Justices in concurring oninions also leave the door ajar with respect to even longer periods of limitation.

> Today, this Court holds that a Texas statute prescribing a one-year statute of limitations for paternity suits violates the Equal Protection Clause of the Fourteenth Amendment. Although I agree with the Court's analysis and result, I write separately because I fear that the opinion may be misinterpreted as approving the four-year statute of limitation now used in Texas, (at 4375).

The concurring opinion of Justice O'Connor (four Justices concurring) also indicates that the statute should be tolled during periods of minority.

> It is also significant to the result today that a paternity suit is one of the few Texas causes of action not tolled during the minority of the plaintiff. Of all the difficult proof problems

> that may arise in civil actions generally, paternity, an issue unique to illegitimate children, is singled our for special treatment. When this observation is coupled with the Texas legislature's effort to deny illegitimate children any significant opportunity to prove paternity and thus obtain child support, it is fair to question whether the burden placed on illegitimates is designed to advance permissible state interests.
>
> Finally, the practical obstacles to filing suit within one year of birth could as easily exist several years after the birth of the illegitimate child...The risk that the child will find himseld without financial support from his natural father seems as likely throughout his minority as during the first year of his life. (at 4375 and 4376)

The limitations contained in S6704(e) not only hinder, but in this case, would prevent the achievement of this goal by setting an arbitrary limit on the period in which either a mother or a child may prove paternity.

We conclude that the six year limitation of 42 Pa. C.S.A. s6704(e), is not substantially related to any permissible State interest, and is violative of the constitutional rights of a non-marital child, inasmuch as it unconstitu-

tionally discriminates between non-marital and marital children in violation of the Equal Protection clause of the United States Constitution and Article 1, S26, the Pennsylvania Constitution.

ORDER

AND NOW, this 12th day of April, 1982, the defendant's Motion to Dismiss Complaint for Support is denied.

s/ R. L. Nygaard
Richard L. Nygaard, Judge

APPENDIX C

SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

DEBORAH ANN ASTEMBORSKI	:	
	:	
vs	:	NO. 22 W.D. APPEAL
	:	DOCKET, 1982
ROBERT SUSMARSKI,	:	
Appellant	:	

JUDGMENT

SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

DEBORAH ANN ASTEMBORSKI	:	
	:	
vs	:	NO. 22 W.D. APPEAL
	:	DOCKET, 1982
ROBERT SUSMARSKI,	:	
APPELLANT	:	

J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of COMMON PLEAS OF ERIE COUNTY, CIVIL ACTION-LAW, be, and the same is hereby reversed.

BY THE COURT:

s/ Carl Rice
Carl Rice, Esquire
Prothonotary

Office-Supreme Court, U.S.
FILED
APR 6 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1481

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

DEBORAH ANN ASTEMBORSKI,

Petitioner,

vs.

ROBERT SUSMARSKI,

Respondent,

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

RONALD J. SUSMARSKI
JAY S. NEDELL
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I.

QUESTION PRESENTED

Whether the six year paternity statute of limitations violates equal protection guarantees of the Fourteenth Amendment to the United States Constitution and of Article I, §26 of the Pennsylvania Constitution.

PARTIES

Contrary to Petitioner's statement in his Writ of Certiorari Petition, the caption of this case does not contain the names of all parties to the proceeding before the Supreme Court of Pennsylvania. In the Supreme Court of Pennsylvania, the County of Erie appeared in the court below.

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III.

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Poulos v. New Hampshire, 345 U.S. 395 (1953). 5

STATUTES CITED.

28 U.S.C. §1254(1) 1, 4
28 U.S.C. §1257(2) 1, 4, 5
42 Pa. C.S.A. §6704(e) 1, 3

RULES CITED.

U. S. Supreme Court Rule 19(.3). 5
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OPINION BELOW

The Opinion of the Pennsylvania Supreme Court, Western District for the case of Astemborski v. Susmarski is reported at 451 A. 2d 1012 (1982).

JURISDICTION

The Pennsylvania Supreme Court entered judgment in favor of the Respondent herein on November 4, 1982. Petition for Writ of Certiorari was filed on or about February 4, 1983 by Petitioner's Counsel. Jurisdiction of this Court is sought by Petitioner under 28 U.S.C. §1254(1) but was revised by an Amended Statement of Jurisdiction by Petitioner's Counsel invoking jurisdiction under 28 U.S.C. §1257(2) on or about March 7, 1983.

STATUTE INVOLVED

The Statute involved is 42 Pa. C.S.A. 6704(e):

> All actions to establish the paternity of a child born out of wedlock brought under this section must be commenced within six years of the birth of the child, except where the reputed father shall have voluntarily contributed to the support of the child or shall have acknowledged in writing his paternity, in which case an action maybe commenced at any time within two years of any such contribution or acknowledgment by the reputed father.

In The

SUPREME COURT OF THE UNITED STATES

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vs.

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Respondent,

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

COUNTERSTATEMENT OF FACTS

On September 9, 1980, Deborah Ann Astemborski, Petitioner, filed an application for support with the Commonwealth's Department of Public Welfare, and, in so doing, assigned to the Commonwealth all rights concerning support of her child. Accordingly on December 30, 1980, she appeared at the intake office of the Erie County Domestic Relations Department and filled out a Complaint for Support which was dated and marked

filed December 30, 1980. This Complaint was taken to the Prothonotary in order to receive a civil number on January 29, 1981, fifteen days after the applicable six year statute of limitations had expired. The trial court held that the governing rule at the time required the Complaint to be filed with the Prothonotary, not with the Domestic Relations Department. For this reason, the trial court concluded that the Complaint was not timely filed, and the alleged father of Petitioner's child, Respondent Robert Susmarski, moved for dismissal of the Complaint. Dismissal was denied; however, as the trial court declared the statute of limitations a denial of equal protection.

A direct Appeal to the Pennsylvania Supreme Court was taken by Respondent herein on May 12, 1982, and subsequently argued by the parties on September 23, 1982. In an Opinion and Order filed November 4, 1982, the Pennsylvania Supreme Court overturned the Court of Common Pleas of the Six Judicial District of Pennsylvania and upheld the provisions of 42 Pa. C.S.A.

§6704(e) as being constitutional and not a denial of equal protection.

On or about February 4, 1983, a Petition for Writ of Certiorari from the final judgment of the Pennsylvania Supreme Court was filed in the United States Supreme Court by Petitioner invoking jurisdiction under the provisions of 28 U.S.C. §1254(1).

Subsequently on or about March 7, 1983, Petitioner's counsel attempted to amend his jurisdictional statement to 25 U.S.C. §1257(2).

ARGUMENT

1. The Petitioner incorrectly filed the Petition for Writ of Certiorari depriving this Court of Jurisdiction over the case.

Petitioner has failed to file any Notice of Appeal in the instant case to date and therefore a direct Appeal to the Court will not lie, and the Petition for Writ of Certiorari is plainly incorrect. In Petitioner's Writ of Certiorari, Petitioner's jurisdiction statement of 28 U.S.C. §1254(1) to this Court does not extend to an action of this nature where

final decision of state court has sustained validity of state statute challenged on federal constitutional grounds. In such instances the United States Supreme Court is required to take jurisdiction by Appeal, and not by way of Certiorari. Poulos v. New Hampshire, 345 U.S. 395 (1953) reh. den. 345 U.S. 5978 (1953). The decision herein of the Pennsylvania Supreme Court is reviewable, if at all, only by Appeal Jurisdiction under 28 U.S.C. §1257(2) and accordingly, the Writ of Certiorari should be denied.

2. The Petitioner failed to comply with the statute and rules of this Court thereby depriving the Court of jurisdiction over the case.

Pursuant to Supreme Court Rule 19(.3) Counsel for the Petitioner failed in his duty to notify Respondent on a form supplied by the Clerk, of the date of filing and of the docket number of the case. Such Notice was to have been served as require by Rule 28.

Pursuant to Supreme Court Rule 21(.1)(b),

Petitioner failed to name all parties to the proceeding in the Court below by failing to name and notify the County of Erie.

Pursuant to Supreme Court Rule 28(.4)(c) Petitioner failed to notify and serve the Attorney General of the State of Pennsylvania that the constitutionality of a statute of the State was drawn in question and its constitutionality challenged.

Accordingly, due to the above violations of the rules of the Supreme Court and Statutes, the Writ of Certiorari should be denied.

3. The decision of the Pennsylvania Supreme Court is obviously correct because it involves no conflict of opinion or other reason for review by this Court.

Contrary to Petitioner's views, there is no conflict between the decision of the Pennsylvania Supreme Court and Mills v. Habluetzel, — U.S.—, 102 S. Ct. 1549 (1982).

The Supreme Court of Pennsylvania followed the mandates of this Court in Mills. According to Mills:

> The fact that [the State] must provide illegitimate children with a bona fide opportunity to obtain paternal support does not mean, however, that it must adopt procedures for illegitimate children that are coterminous with those accorded legitimate children. Paternal support suits on behalf of illegitimate children contain an element that such suits for legitimate children do not contain: proof of paternity.
>
> . . . The State's interest in avoiding the litigation of stale or fraudulent claims will justify those periods of limitation that are sufficiently long to present a real threat of loss or diminution of evidence, or an increased vulnerability to fraudulent claims. Mills at pp. 1553-1555.

The Supreme Court of Pennsylvania stated that "Although the statute of limitations in question, as applied, results in there being greater impediments to the obtainment of support for an illegitimate child then for one born in wedlock, the support opportunity still accorded the former is not so truncated as to be, as termed by the Court in Mills, merely 'illusory.' Allowance of a six year period in which to institute a paternity claim does not so restrict support rights as to effectively extinguish

them." Astemborski v. Susmarski, 451 A.2d 1012, 1013-1014 (1982).

Moreover, The Supreme Court of Pennsylvania stated the following:

> We do not address the wisdom of the legislative scheme, but only its constitutionality. Since the statute is substantially related to a legitimate state interest, viz., the prevention of stale or fraudulent paternity claims, it is not constitutionally infirm under a Fourteenth Amendment challenge even though the statute may operate, as it has in this case, to deprive an illegitimate child of its right to make a claim for support beyond the six year limit. Astemborski at p. 1015.

There is no reason to anticipate that the Court, if directly confronted with the issue, would disagree with the Pennsylvania Supreme Court's application of the Mills case to the instant case since it is in compliance with this Court's directives. The Court's decision is obviously correct and involves no conflict of opinion or other basis for review by this Court, and, therefore, no reason is apparent for review of the decision below.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari filed by Petitioner, Deborah Ann Astemborski, should be denied.

Respectfully submitted,

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